

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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74-2682

IN THE

**United States Court of Appeals
For the Second Circuit**

No. 74-2682

LAWRENCE D'ALLESANDRO,

Petitioner-Appellee,

against

UNITED STATES OF AMERICA,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLEE

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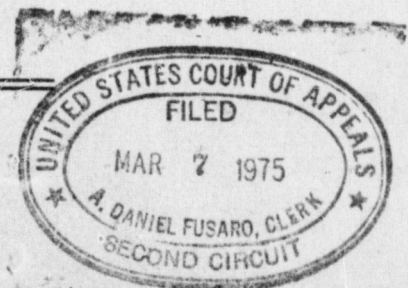


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No. 74 - 2682

LAWRENCE D'ALLESANDRO,

Petitioner-Appellee,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellant.

BRIEF FOR PETITIONER-APPELLEE
LAWRENCE D'ALLESANDRO

Preliminary Statement

This brief is submitted in opposition to an appeal taken by the United States of America from an Order of the United States District Court (Weinstein, J.), entered on November 12th, 1974, which set aside a Judgment of Conviction and allowed the Appellee, Lawrence D'Allesandro, to withdraw his plea of

guilty to violating the federal narcotics laws, Title 21, United States Code, Section 841(a)(1).

STATEMENT OF THE FACTS

The relevant facts may be briefly stated. On August 16th, 1972, Lawrence D'Allesandro was indicted, along with five other named defendants including his mother, Lucy D'Allesandro.^{1/} This seven-count Indictment charged violations of the federal narcotics laws relating to the distribution of heroin, Title 21, United States Code, Section 841(a)(1), conspiracy and perjury, Title 18, United States Code, Section 1623.

On October 30th, 1972, the Appellee, Lawrence D'Allesandro, withdrew his not guilty plea and entered a plea of guilty to the second count of the Indictment. (A 35)* This was a negotiated plea, wherein the Government agreed to dismiss,

^{1/} The Indictment appears in Appellant's Appendix at p.7. This Indictment, docketed in the District Court as No. 72 CR 970, superseded an earlier Indictment, No. 72 CR 835.

* The letter "A" refers to the Appellant's Appendix filed in connection with this appeal.

with prejudice, the charges against Lawrence's mother.^{2/} (A 35 - 36) Additionally, all remaining counts in the Indictment were to be dismissed at the time of sentence and, further, a complaint then pending before the United States Magistrate charging additional offenses would be dismissed. (A 35 - 36)

On December 1st, 1972, Lawrence was sentenced to four years imprisonment. In addition, the Appellee was fined in the amount of \$10,000 and given a special parole term of three years. The docket sheet reflects that at the time of this sentence, the charges against Lucy D'Allesandro were dismissed. (A 3)

Thereafter, on July 3rd, 1974, Lawrence D'Allesandro wrote a letter to Judge Weinstein stating that he wished to withdraw his plea because, inter alia, the record concerning his plea and the disposition of his mother's case was confused and unclear. (A 63 - 64) This letter was treated by the Court as a 2255 application^{3/} to vacate the Judgment of Conviction and docketed by the Clerk of the Court as No. 74 C 1033.

^{2/} In view of the fact that Appellee's mother, Lucy D'Allesandro, is involved in this case, to avoid confusion, the Appellee will be referred to as Lawrence.

^{3/} Title 28, United States Code, Section 2255.

This procedural step was taken in response to the first paragraph of the Appellee's letter which is particularly significant.

"I'm now writing this informal letter with the hope and expectation that you treat it as a formal Motion 2255, to vacate my sentence, or offer me whatever relief the Court may deem necessary."
(A 63)

One week later, on July 10th, 1974, Judge Weinstein ordered that the Clerk of the Court "treat the attached papers from Lawrence D'Allesandro as a civil action to set aside his conviction." It was then ordered that the Government attorneys were to investigate these allegations and furnish a written report to the Court. (A 62) The Government finally complied with this Order in a letter dated October 4th, 1974. The Government attorney attributed the confusion to a "mistake in the transcript" and stated that in all other respects, the integrity of the plea was not affected. (A 74 - 75) On October 9th, 1974, the District Court Judge ordered that a hearing be held on the issues raised. (A 75).

On November 12th, 1974, that hearing was held. (A 79) After brief testimony was taken, the Trial Court concluded

that there was,

"...serious question about the validity of the plea and...confusion which may have been engendered in the mind of the defendant, and the mind of his mother..."

Therefore, the Court ordered that,

"The defendant is to have his plea set aside..." (A 100)

Immediately thereafter, the Appellee withdrew his reinstated plea of not guilty and entered a new plea of guilty to count two of the Indictment. (A 100) On this plea, the Appellee was sentenced to, in effect, time served. (A 103)

After the sentencing process had been completed, the Assistant United States Attorney requested that Judge Weinstein prepare a written opinion. (A 105) The Trial Court denied this request and stated that:

"I find as a matter of fact that the sentence was invalid because the plea was not properly taken." (A 105)

The Government's appeal herein is from Judge Weinstein's Order allowing the Appellee, Lawrence D'Allesandro, to withdraw his plea of guilty.

STATEMENT OF THE ISSUES

1. Whether the Order of the District Court allowing Lawrence D'Allesandro to withdraw his plea of guilty is appealable by the Government?

2. Whether the District Court's Order allowing withdrawal of the plea was an abuse of discretion sufficient to warrant reversal?

POINT I

THE GOVERNMENT IS WITHOUT RIGHT TO
APPEAL THE ORDER OF THE DISTRICT
COURT; THE APPEAL HEREIN SHOULD BE
DISMISSED.

Lawrence D'Allesandro's first argument is that the District Court's Order allowing withdrawal of his guilty plea is non-appealable.^{4/} This argument is two-dimensional. First, Appellee contends that characterization of his July 3rd, 1974 letter to the District Court as a pro se 2255 application does not mean that this was a civil proceeding in which the Government

^{4/} The Government did not address themselves to this issue in their brief on appeal.

has a general right to appeal. To the contrary, it will be demonstrated that this letter was simply another step in the criminal proceeding from which the Government has no Appellate remedy. Secondly, D'Allesandro claims that, in any event, this appeal is barred by the double jeopardy clause of the United States Constitution because of the fact that the Appellee was sentenced on his November 12th, 1974 plea of guilty.

Apparently assuming that no issue would be raised in this regard, the Government states that their appeal is taken from Judge Weinstein's Order vacating a judgment entered upon Lawrence D'Allesandro's plea of guilty. (Appellant's Brief, p.1). The Government further states that this appeal is taken pursuant to Title 28, United States Code, Section 1291. For purposes of this appeal, therefore, the Government obviously regards this proceeding as civil in nature. Concededly, this view of the matter is, at least on the surface, supported by the record. Judge Weinstein's Order of July 10th, 1974 directs that:

"The clerk of the court will treat the attached papers from Lawrence D'Allesandro as a civil action to set aside his conviction." (A 62)

It is here submitted, however, that the label which was

attached by the Court and which the Government will undoubtedly wave, is not determinative of the matter and does not adequately reflect the complexity of the issue presented herein.

In his letter to the District Court dated July 3rd, 1974, Lawrence, without the benefit of counsel and on the advice of fellow inmates (A 81), stated that:

"I'm now writing this informal letter with the hope and expectation that you treat it as a formal motion 2255, to vacate my sentence, or offer me whatever relief the court may deem necessary."
(A 63, Emphasis supplied)

As stated, the District Court complied with this request and treated the letter as a civil motion pursuant to Title 28, United States Code, Section 2255. The relief requested herein, however, could well have been afforded pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure. Rule 32(d) provides:

"Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

In the context of this case, there is no practical distinction between the relief available under Section 2255 and that

available under Rule 32(d). The only relevant distinction that can be drawn is found not in the relief available, but in the fact that the Government cannot appeal from an Order pursuant to Rule 32(d). This distinction, it is submitted, is far too subtle to allow the Government the right to appeal in those cases where the 2255 label is attached.

In United States v. Lias, 173 F.2d 685 (4th Cir., 1949), the Circuit Court, reviewing a situation similar to that at bar, held that under the then effective federal appeal statute, there can be no appeal by the Government except from a final judgment which puts an end to the proceeding. As in Lias, the Government is here seeking to appeal from an Order which vacated a judgment and sentence and allowed the Appellee to withdraw his plea of guilty. (Appellant's Brief, p.1) Although the federal appeals statute, Title 18, United States Code, Section 3731 has been amended since the Lias decision, that amendment is not relevant to the issue at bar. In part, Section 3731 provides that:

"In a criminal case an appeal by the United States shall lie to a Court of Appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause

of the United States Constitution prohibits further prosecution."

However "liberally construed", there is no authority for the United States to appeal from an interlocutory order.^{5/}

Without statutory authority, the Government is without right to appeal an Order in a criminal case. See, United States v. Suarez, 505 F.2d 166 (2nd Cir., 1974). In Suarez, this Court noted that the criminal appeals act, Section 3731,

"...was intended to authorize an appeal by the government from an order of a district court terminating a criminal case as far as is constitutionally permissible..." (Emphasis supplied).

The Order of the District Court which the Government seeks to attack herein, did not terminate the prosecution, but merely reinstated the previously entered not guilty plea. Such an Order necessarily contemplates reprosecution of the defendant and is, therefore, a non-appealable interlocutory ruling. United States v. Jorn, 400 U.S. 470, 477-78 (1971).

In United States v. Shapiro, 222 F.2d 836 (7th Cir.,

^{5/} The exception is that an appeal may lie under specified circumstances from an Order of a District Court suppressing evidence in a criminal proceeding.

1955), the Circuit Court dismissed the Government's appeal and held that:

"...the order of the district court here in setting aside the judgment of conviction and permitting the defendant to withdraw his plea of nolo contendere was not a final appealable judgment."

In Shapiro, the Government argued that the Court's judgment under Rule 32(d) should be held to be in the nature of a civil proceeding from which the Government could prosecute an appeal and that the appeals statute, applicable only to criminal cases, did not define or confine their general right to appeal. Rejecting this argument, the Court stated that:

"We think there can be no real doubt but that in the instant case the proceeding to vacate the judgment and to permit the withdrawal of the defendant's plea of nolo contendere was a step in the criminal case. It was filed as authorized by Rule 32(d) of the Federal Rules of Criminal Procedure. The motion was filed in the same court where the defendant was originally convicted and docketed under the same criminal case number as the original action, no. 345-Crim.-T. The hearing on the motion was then held and the matter determined by the same trial judge who had heard the original criminal case and who had entered the original judgment of conviction. This motion constituted a direct attack on the defendant's conviction in the original criminal case. After the hearing on the

motion and after the original judgment had been set aside, the defendant pleaded over again, was again found guilty, was fined and re-sentenced in the same proceeding." 222 F.2d at p.839, 840.

The case at bar is strikingly similar. The only distinction is that Lawrence asked that his letter be treated "as a formal motion 2255." As previously noted, this was apparently on the advice of a fellow inmate. (A 81) Moreover, the introductory paragraph alternatively asked for "whatever relief the court may deem necessary." It is clear, therefore, that this informal application could well have been treated as a Motion pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure. The fact that it was arbitrarily labeled otherwise, it is submitted, is not controlling.

It has been noted that there is considerable overlap between a Motion to vacate a sentence under Section 2255 and a Motion to withdraw a plea under Rule 32(d). 8A, Moore's Federal Practice, Section 32.07(4). This overlap was reflected in Meyer v. United States, 424 F.2d 1181 (8th Cir., 1970). In Meyer, the Petitioner filed a pro se 2255 Motion to withdraw his plea of guilty. In considering the Petitioner's appeal, the Circuit Court noted that:

"The district court treated Meyer's

petition as a petition under 18 U.S.C., Rule 32(d), Fed.R.Crim.P., to withdraw his guilty plea rather than one under 28 U.S.C., §2255 attacking the sentence. Even though it is termed a section 2255 motion, petitioner may assert therein a right recognized by Rule 32(a), (citation omitted), and since the other relief which Meyer requested would necessarily have been granted if he were allowed to withdraw his guilty plea, his petition may be properly considered as a motion under Rule 32(d). (Citation omitted). The fact is that if a prisoner is entitled to the relief he prays for, it will be granted irrespective of the designation of the petition." 424 F.2d at p.1190 (Emphasis supplied).

See, also, United States v. Kent, 397 F.2d 446 (7th Cir., 1968).

In Ching v. United States, 338 F.2d 333 (10th Cir., 1964), the District Court denied the defendant's motion to withdraw his plea of guilty

"...as being without merit, whether considered as a motion to withdraw a guilty plea under Rule 32(d) or as a motion to vacate sentence under 28, U.S.C., Section 2255."

In the first instance, the Government moved to dismiss Ching's appeal on the ground that his notice of appeal was untimely under the then effective Rule 37(a), F.R.C.P. which set forth a ten-day period in which to file a notice of appeal. In

Ching, therefore, the Government, in an effort to have the appeal dismissed, viewed the matter as criminal in nature. In this case, in an effort to advance an appeal, the Government relies upon the fact that the 2255 label was chosen.

The Ching case does not represent the only reported instance where the Government has sought to switch labels in order to benefit their position on appeal. See, Zaffarano v. United States, 306 F.2d 707 (9th Cir., 1962). The United States Supreme Court has stated that the "civil" label attached to habeas corpus proceedings is "gross and inexact." Harris v. Nelson, 394 U.S. 286 (1969). There, the Court stated that "essentially, the proceeding is unique." To charge that a defendant, counselled by a fellow inmate, should be held to appreciate the esoteric distinction between these two proceedings achieves an inordinately unfair result. Section 2255 and Rule 32(d) are merely procedural vehicles to obtain the ultimate relief - withdrawal of the guilty plea. In fact, the 2255 application may be viewed as a method by which to obtain the relief afforded by Rule 32(d). The 2255 stamp in this case was clearly superfluous. The same result could have been achieved had the letter been characterized as a Motion

pursuant to Rule 32(d). If it had been characterized in this manner, it is without question that the Government may not have appealed. To now allow an appeal because of some procedural fiction would be inconsistent with the fundamental concept of fairness in a criminal prosecution.

POINT II

THE GOVERNMENT'S APPEAL HEREIN
IS BARRED BY THE DOUBLE JEOPARDY
CLAUSE OF THE FIFTH AMENDMENT TO
THE UNITED STATES CONSTITUTION.

Assuming arguendo that the Government was entitled to appeal this Order, the right was lost by the fact that the Appellee was subsequently convicted on his renewed plea of guilty. This argument rises to a constitutional level. Lawrence contends that the Fifth Amendment's double jeopardy clause prohibits the Government from appealing the Order of the District Court.

Immediately after the Court granted the Motion to withdraw the guilty plea, counsel for the Appellee made the following application:

"MR. LA ROSSA: May it please the court, the defendant does have an application. Defendant Lawrence D'Allesandro, moves to withdraw the plea of not guilty and enter a plea of guilty

to count 2 of the indictment."
(A 100)

No attempt was made by the Government attorney at this point to prevent the Appellee from re-pleading in order to seek review.^{6/} The only statement which the Government attorney made at this time was a request that the guilty plea be recorded. (A 100)

It is established beyond dispute that Lawrence's guilty plea, entered after his original conviction had been vacated, had the same effect as if a trial had been held and the Appellee had been convicted. Riaddon v. United States, 274 F.2d 304 (6th Cir., 1960). See, also, Bishop, Waivers In Pleas Of Guilty, 60 F.R.D. 513. Upon such conviction, jeopardy attached. North Carolina v. Pearce, 395 U.S. 711 (1969). To vacate the sentence imposed on November 12th, 1974, would violate the Fifth Amendment prohibition against placing a defendant "twice in jeopardy." If, for example, the District Court, after vacating the plea, had ordered that the case proceed to trial and that trial resulted in acquittal, it would be clear that

^{6/} The Government attorney did eventually seek a stay but only after the defendant had been sentenced and jeopardy had attached. (A 105)

the acquittal could not be upset by reversal of the Court's Order allowing withdrawal of the plea. Similarly, since a conviction supplies protection against double jeopardy, the conviction herein entered on November 12th, 1974 cannot be disturbed by Government appeal. Therefore, even if the District Court's Order was appealable as "civil in nature," that appealability was lost due to the subsequent conviction.

POINT III

THE ORDER ALLOWING THE APPELLEE TO
WITHDRAW HIS PLEA OF GUILTY WAS WELL
WITHIN THE DISCRETION OF THE TRIAL
COURT; THAT RULING SHOULD NOT BE
DISTURBED ON APPEAL.

The Trial Court found that Lawrence D'Allesandro's guilty plea entered on October 30th, 1972 was marked with "confusion".

The Court ruled that:

"...in view, however, of the serious question about the validity of the plea and the confusion which may have been engendered in the mind of the defendant and the mind of his mother, the defendant is to have his plea set aside and the court will entertain an application now, if he wishes to consider repleading."
(A 100)

Later in the proceeding, at the request of the Government attorney, the Court made the following finding:

"Clerk's minutes do indicate no confusion, but there is a serious doubt and I think in view of the serious doubt justice requires motion be granted. And I find as a matter of fact that the sentence was invalid because the plea was not properly taken. A written one, the practice now, is to put those things on tape."
(A 105)

This ruling was well within the discretion of the Trial Court.

Rule 32(d), F.R.C.P. specifically states that,

"...to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."^{7/}

The Government plaintively argues that Judge Weinstein's Order was,

"...a transparent attempt to usurp the powers of the Board of Parole and overcome the limitations placed upon his power to reduce sentence by Rule 35 of the Federal Rules of Criminal Procedure."
(Appellant's Brief, pp. 1 - 2)

^{7/} The standard applied by the Trial Court strengthens D'Allesandro's argument that for Appellate purposes, the relief granted should be viewed as an Order pursuant to Rule 32(d). It has been noted that "the concept of 'manifest injustice' gives the court somewhat more latitude to permit withdrawal than does the showing of a due process or other fundamental violation usually required for vacation under section 2255." 8A, Moore's Federal Practice, Section 32.07[4]. The Court's remarks, therefore, indicate that vacation of the plea rested, in actuality, on Rule 32(d).

To be sure, the record of the November 12th, 1974 hearing is replete with both practical and philosophical reference to the sentence and parole process. However, the fact remains that Lawrence D'Allesandro came before the Court on a claim that his plea was confused and unclear. The Government would have this Court find, on review, that there was absolutely no basis for this claim. Suffice it to say that where an essential part of a defendant's plea is a promise by the Government that it will dismiss a criminal prosecution against that defendant's mother, the plea becomes inherently suspect. The Government, in asking this Court to make a determination of what the District Court was "really thinking" when he vacated the conviction, invites a dangerous precedent.

The United States Supreme Court in Kercheval v. United States, 274 U.S. 220 (1927), stated that:

"The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."

The Government has, time and again, argued that these discretionary rulings and findings of fact should not be disturbed on appeal. See, e.g., United States v. Lombardozzi, 436 F.2d 878 (2nd Cir., 1971). That position is as sound here as in

those cases in which a defendant appeals from an adverse ruling. In dismissing the Government's appeal in United States v. Lias, supra., the Court stated that:

"And we think that the appeal should be dismissed for the additional reason that it is entirely without merit in that it asks reversal of an action lying well within the discretion of the trial judge."

As stated by the Court in Meyer v. United States, supra.,

"The good faith, credibility and weight of a defendant's assertions and those made on his behalf in support of a motion under Rule 32(d) are issues for the trial court to decide."

There is, it is submitted, absolutely no justification to disturb the findings made by the Trial Court in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Government's appeal should be dismissed or, in the alternative, that the Order of the District Court should be affirmed.

Respectfully submitted,

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Service of ^{Two} ~~three~~ 2 copies of the within
is admitted this 7th day of March 1975

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